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Oregon.<sup>5</sup> Certain cases in other jurisdictions, apparently in conflict with this note, are believed to be based on rules of construction differing from that expressed in the code section.<sup>6</sup> Apparently the general rule is, however, very similar to that enunciated by the California legislature and courts.<sup>7</sup> But whatever the rule in other jurisdictions, the California law seems to be plainly opposed to the dictum in the principal case.

A. B. S., Jr.

**Surety: Modifications in Principal Contract Not Discharging Surety.**<sup>1</sup>—In an action by owners against a surety of a building-contractor, it was held that none of the following matters constituted a defense:

1. The payment of the amount of one installment specified in the contract to sub-contractors, material men and laborers instead of to the contractor personally, the payment having been made on the contractor's "O. K.-ing" each of the claims and giving his receipt to the owners for the installment.

2. The fact that the building as constructed was 121 feet, 7 inches in depth, instead of 120 feet as shown by the plans, where the difference was due solely to a mistake of those engaged in the work, without knowledge on the part of the owner, especially in view of the fact that the building contract provided for alterations, deviations, additions and omissions on the request of the owner without avoiding the contract.

3. Changes aggregating \$130 on a \$16,000 contract, although there was no agreement as to the valuation therefor prior to their execution. The contract provided: "Upon the demand of either the contractor, owner or architect, the character and valuation of any or all changes, improvements or extra work shall be agreed upon and fixed in writing signed by the owner or architect and the contractor prior to execution." The court said as to this: "It may be conceded that material changes in the plans and specifications not expressly authorized by the contract, or material changes authorized by the contract made by the parties without following a particular method prescribed therefor by the contract, and made without the knowledge or consent of the surety, would operate to discharge the surety on the bond of the contractor." But here the provision for valuation, etc., was applicable

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<sup>5</sup> Zelig v. Blue Point Oyster Co., 54 Ore. 543; 104 Pac. 193 (1909).

<sup>6</sup> Cortesy v. Territory, 7 N. M. 89; 32 Pac. 504 (1893); Dimpfel v. Beam, 41 Colo. 25; 91 Pac. 1107 (1907).

<sup>7</sup> Sutherland on Statutory Construction, 133-134; McGuire v. C. B. & Q. R. R. Co., 131 Ia. 340; 108 N. W. 902 (1906); McKibben v. Lester, 9 Ohio St. 628 (1859); Black on Interpretation of Laws, 357; followed in Stonega Co. v. Southern Co., 123 Tenn. 428; 131 S. W. 988 (1910), and Stiers v. Mundy, 174 Ind. 651; 92 N. E. 374 (1910).

<sup>1</sup> Wolf v. Aetna Indemnity Co., 44 Cal. Dec. 299; 126 Pac. 470 (Aug. 19, 1912).

only in case the contractor, owner or architect demanded the agreement or written valuation, while the contract provided for the making of changes without regard to such valuation except where the same was demanded.

It was contended that plaintiffs could not recover because they pleaded the contract as originally made and not as modified. The court sustained the general rule that the pleader can recover only on the contract alleged, and not upon some other or different contract, but here the contract expressly provided for the changes, and that "the same shall in no way affect and make void this contract . . . and this contract shall be held to be completed when the work is finished in accordance with the original plans as amended by such changes, whatever may be the nature and extent thereof." It was held, therefore, that there was no new or substituted contract; that the action was for damages for breach of the original contract whereby the contractor had in effect agreed to construct the building according to the plans and specifications as they were at the time of the signing of the contract amended by such changes as might be made during the progress of the work.

L. H. J.

**Tide Waters: Title to Submerged Lands: Right of Public to Hunt.**—The legislation of the State of California has not shown, it seems, any intention to renounce the rights of the public in regard to navigation and fishery over tide and swamp lands, even when sold into private ownership.<sup>1</sup> In other words, the person acquiring such lands under purchase from the State takes them (at least so long as they remain submerged), subject to these paramount public easements. Whether these important rights extend so far that the State may, in the interest of commerce and navigation, revoke such grants is, according to the principal case, an open and pending question.<sup>2</sup> There is the authority of the United States Supreme Court which would seem to warrant the conclusion that this can be done by the Federal government without compensation to the owner of the soil.<sup>3</sup> And a recent case in New York sustains the same proposition with respect to the power of the States.<sup>4</sup> Again, whether lands permanently covered by such waters can be granted away at all, under the legislation of this State, is still an unsettled question in this field of law abounding with such questions, and the Supreme Court in the present case suggests more than a doubt whether the legislature has authorized such grants.<sup>5</sup> And over

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<sup>1</sup> *Forestier v. Johnson*, 44 Cal. Dec. 471, decided Oct. 1, 1912.

<sup>2</sup> "The question of the validity and effect of such patents, as affecting the right of the State to vacate them or retake the lands is involved in other cases now pending before this court." *Forestier v. Johnson*, at page 474. A recent Oregon case holds such grants valid. *Corvallis etc. R. R. Co. v. Benson*, 121 Pac. 418 (Ore. 1912).

<sup>3</sup> *Scranton v. Wheeler*, 179 U. S. 141 (1900).

<sup>4</sup> *Blue Point Oyster Co. v. Briggs*, 198 N. Y. 287; 91 N. E. 846 (1910).

<sup>5</sup> "Conceding that they (the provisions of the Political Code) au-